PD-1044-19
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
Transmitted 2/5/2020 11:41 AM
Accepted 2/6/2020 11:24 AM
DEANA WILLIAMSON
CLERK

RESPONDENT REQUESTS ORAL ARGUMENT

FILED
COURT OF CRIMINAL APPEALS
2/6/2020
DEANA WILLIAMSON, CLERK

No. PD-1044-19

IN THE
COURT OF CRIMINAL APPEALS OF TEXAS
AT AUSTIN, TEXAS

THE STATE OF TEXAS,
Petitioner

vs.

RICKY MORENO,
Respondent

From the Court of Appeals for the
Fifth District of Texas at Dallas
In Cause Number 05-18-00271-CR

RESPONDENT'S BRIEF ON THE MERITS

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IDENTITY OF JUDGE, PARTIES, AND COUNSEL

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TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

COMES NOW Respondent Ricky Moreno and submits this response to the State's brief on the merits based on this Court's grant of discretionary review of the opinion of the Fifth District Court of Appeals at Dallas.

STATEMENT OF THE CASE

Respondent was originally indicted for the offense of capital murder; on January 25, 2018, he was re-indicted for the offense of aggravated kidnapping. (CR:32). A Dallas County jury convicted Respondent of aggravated kidnapping upon a plea of not guilty and, on March 6, 2018, assessed a sentence of 45 years' imprisonment and a $10,000 fine. (CR:128). Respondent filed a timely motion for new trial, which the trial court overruled. (CR:164). On appeal, the Fifth District Court of Appeals at Dallas reversed judgment on the grounds that the trial court abused its discretion and ultimately harmed Respondent when it excluded from the guilt-innocence phase evidence that Respondent suffered from PTSD. *Moreno v. State*, 586 S.W.3d 472 (Tex. App.—Dallas 2019, pet. granted). The State filed a petition for discretionary review, and on November 20, 2019, this Court granted review. On December 18, 2019, the State filed a brief on the merits, and Respondent

now files a responsive brief urging that this Court affirm the court of appeals' decision.

GROUND FOR REVIEW

The trial court excluded evidence of the defendant's particular circumstances as irrelevant to the objective reasonable person standard for duress. Did the court of appeals err in finding an abuse of discretion by the trial court?

STATEMENT OF FACTS

On July 1, 2016, Martin Armijo tortured and killed complainant Jonathan Gutierrez in a drug house located at 755 Elwayne Avenue in Dallas, Texas. Complainant was the father of Armijo's ex-girlfriend's children. (RR6:150-54, 170-71, 174, 177, 178). Police responded to a 911 call concerning to a dead body at 755 Elwayne, specifically in a converted garage behind the main home. (RR6:31). Upon receiving further information that the suspect likely remained at the location with weapons, police monitored the perimeter for some time until Armijo emerged from the building. (RR6:33). Armijo failed to acknowledge police commands and fled; multiple officers chased and ultimately apprehended him. (RR6:33, 77). Remaining officers entered the structure and found Armijo's ex-girlfriend, Avigail Villanueva; she was "hysterical," physically shaking, and unable to speak in full sentences.

(RR6:33). She was also shielding a bloody laceration to her head. (RR6:33). Police discovered complainant, deceased, inside the structure, along with a number of weapons—two semi-automatic handguns, one containing live rounds; an assault rifle; a folding knife; a baseball bat; and two boards. (RR6:69, 128).

The evidence showed that Armijo tortured complainant over a course of hours in the drug house, beating him with baseball bat, pouring bleach on him, and stabbing him with a pocketknife. (RR6:170-71, 174, 177, 178). Respondent also happened to be at the drug house on the same day and remained witness to the torture out of fear that Armijo would torture him or his mother, who lived nearby. (RR7:110). At the same time, Armijo was repeatedly texting and calling Villanueva to report that he was torturing complainant and wished for her to observe. (RR6:150-154). Villanueva was terrified and, before she agreed, ensured the safety of her mother and children. (RR6:152-155). When Villanueva felt like her mother and children were safe, she walked to a nearby gas station, called Armijo, and said she would come. (RR6:154-155, 216-19). Armijo immediately sent Respondent, in Armijo's car, to retrieve her. (RR6:155).

When Villanueva arrived at Elwayne, she, along with bystanders Thomas Johnson, Johnson's girlfriend, Eric Johnson, David Rodriguez, and Respondent,

witnessed some of the torture. (RR6:180, 230, 236). Armijo had video-recorded the earlier torture on his cell phone and showed it to Villanueva when she arrived. (RR6:236-37). Respondent's actions related to the offense consisted only of his buying cleaning supplies, retrieving Villanueva from the gas station, and holding complainant's feet while Armijo duct-taped his hands—all actions taken at Armijo's direction. (SX 73, 76;[2] RR6:225). When Armijo finally killed complainant, Armijo further ordered Respondent to find something in which to wrap complainant, and he ordered Rodriguez to clean the room. (RR6:180). Armijo next directed Respondent to stand watch outside while he hurt Villanueva. (RR6:181). At some point Thomas left with his girlfriend. (RR6:231). Respondent finally escaped from the home, retrieved his mother who lived two blocks away, and drove to his brother's home where they called 911. (RR7:7; SX 76). But for Respondent calling 911, Villanueva believed she would be dead. (RR7:7). Everyone at the drug house was, at a minimum, snorting heroin; Armijo's drugs of choice were heroin, methamphetamine, and Xanax bars. (RR6:204).

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[2]Undersigned counsel has been unable to open the versions of SX 73 and SX 76 available to the clerk. Counsel e-mailed the court reporter for new versions and did not receive a response. Counsel has relied on trial counsel's versions of Respondent's July 1, 2016 and July 6, 2016 interviews.

SUMMARY OF ARGUMENT

Texas Courts have long held that trauma evidence is admissible for the purpose of defensive issues. The reasonable firmness calculation does not require a reasonable person in a vacuum. It necessarily includes a person's particular circumstances, especially as they bear directly on the defense he is asserting. In this case, Respondent's diagnosis of PTSD, and the circumstances from which the diagnosis emanated, directly bore on his defense of duress. The evidence was both relevant and probative, and its exclusion harmed Respondent by eviscerating his defense.

ARGUMENT

The Court of Appeals properly reversed Respondent's case based upon the trial court's erroneous and harmful exclusion of the following evidence at the guilt-innocence phase:

> [Respondent] proffered the testimony of Dr. Pittman, Dr. Clayton, and Detective Yeric out of the presence of the jury during the guilt–innocence phase. The proffered testimony of Dr. Pittman, a medical doctor specializing in forensic psychiatry, showed that he examined [Respondent] to determine his competency to stand trial. He found [Respondent] competent but concluded [Respondent] suffered from "a potentially severe mental illness," which was "most probably post-traumatic stress disorder." Dr. Pittman testified that [Respondent] discussed in detail a prior incident that "sounded like a home invasion," and that [Respondent's] father was shot during this incident, dying

while [Respondent] held him. [Respondent] had problems after that "with anxiety, depression, nightmares, that sort of thing." Pittman also found [Respondent's] intelligence to be between borderline intellectual functioning and low average and that he "wasn't that bright," but he was not "mentally retarded at all."

Dr. Clayton, also a forensic psychiatrist, testified that she reviewed [Respondent's] school records and background materials from the case (e.g., offense reports and witness statements) before she evaluated him, concluding he suffered from PTSD. Regarding the charged offense, she proffered that [Respondent's] PTSD "affected his—his perception of the—the dangerousness that Mr. Armijo threatened to him, and then also to his family, specifically his mother." She said [Respondent] had "almost a learned helplessness" and "felt kind of terrorized and in shock" when he thought that Armijo "was threatening his life." Dr. Clayton testified that she used criteria from the fifth edition of the Diagnostic and Statistical Manual of Mental Disorders in reaching her conclusion, and that the traumatic event in [Respondent's] life was the home invasion where he was beaten; his mother assaulted; his niece assaulted; and his father murdered. Asked how PTSD might have affected [Respondent's] behavior more than someone who did not have it, Dr. Clayton testified that because of his PTSD, [Respondent] was "more physically afraid" and "essentially kind of froze" when he was with Armijo and Gutierrez, experiencing a "sense of helplessness" and seeing Armijo as "being extremely powerful." He feared Armijo was going to kill him and then kill his mother, who lived in the same neighborhood.

[Respondent] also made a bill of exception proffering the testimony of Detective Yeric regarding the details of the 2012 home invasion. Yeric, the lead detective in the case, testified that appellant's father, Lorenzo Moreno, was murdered during a home invasion of the family's home on North Ezekial Avenue that occurred on Sunday, May 6, 2012. The detective explained that in addition to [Respondent] and his father, [Respondent's] mother, Adela Moreno, and his niece were present. They were all beaten by the masked intruders. [Respondent's] mother

> and niece were beaten in front of [Respondent] and [Respondent's] mother was thrown up against a wall—hitting it with sufficient force to leave a hole in the wall, according to Yeric's testimony. [Respondent] also was severely beaten, suffering two black eyes and a gash on his head that required eight staples. Yeric testified that Lorenzo Moreno was killed in front of [Respondent]. A total of five people were arrested following this incident, and two of them were ultimately prosecuted for murder. The person identified as the shooter was convicted and sentenced to fifty-five years in prison; the other individual pleaded guilty and received a thirty-year sentence. Detective Yeric and Dr. Clayton both testified during the punishment phase.
>
> The State objected to the PTSD-related testimony based on hearsay, relevance, and rule 403. The trial court ultimately concluded that evidence appellant had PTSD was not admissible during the guilt–innocence phase of the trial. The trial court excluded Dr. Pittman's testimony from both phases of the trial; excluded Dr. Clayton's testimony during guilt–innocence because it was "not relevant in this part of the trial"; and excluded Detective Yeric's testimony during guilt–innocence.

Moreno, 586 S.W.3d at 492–93.

The issue that the court of appeals addressed and ultimately resolved in Respondent's favor was whether testimony that Respondent suffered from PTSD and the circumstances surrounding his father's murder, the precipitating traumatic event, bore on his defense of duress. The court of appeals distinguished two seemingly similar cases. It distinguished *Cobb v. State*, No. AP-74875, 2007 WL 274206 (Tex. Crim. App. Jan. 31, 2007) (not designated for publication) on the ground that Cobb's evidence was incomparable to Respondent's: "The disputed

expert testimony, however, did not concern PTSD, but rather testimony that the defendant suffered from cognitive weaknesses consistent with fetal alcohol syndrome, making him more suggestible to outside forces and compulsion and less able to consider other options than an average person." *Moreno*, 586 S.W.3d at 494. And it distinguished *U.S. v. Willis*, 38 F.3d 170 (5th Cir. 1994) on the grounds that, unlike Respondent's trial court, the district court "permitted Willis substantial latitude in introducing evidence to support her theory that she was actually in fear for her life when she committed the acts in question," including testimony from two Dallas police officers, who testified to complainant's violent nature and Willis's fear of him, and a clinical psychologist who testified that Willis suffered a lifetime pattern of abuse, originating in a dysfunctional alcoholic family and permeating two marriages and her violent relationship with complainant. *Id*. at 495-96 (citing *Willis*, 38 F.3d at 174). It also permitted evidence that she suffered from anxiety, depression, a desire to be loved in conflict with a fear that she might be harmed or humiliated, and battered woman syndrome. *Id.* The court of appeals cited *U.S. v. Nwoye*, 824 F.3d 1129, 1137-38 (D.C. Cir. 2016) and held that "any assessment of the reasonableness of a defendant's actions must take into account the defendant's 'particular circumstances,' at least to a certain extent" (citation omitted) and that

"knowledge of the circumstances under which an alleged crime was committed is essential to a jury's determination of whether a defendant's actions were reasonable." *Id*. at 496 (citations omitted). The court of appeals held further that Respondent suffered harmful error: "The disputed testimony went to the heart of appellant's case, and its categorical exclusion had the practical effect of eviscerating his defense. . . . [W]e simply cannot say with any degree of assurance, given the record in this case, that the proffered testimony would have had no effect, or only a slight effect, on the jury's consideration of appellant's duress defense. *Id*. at 497. Respondent adopts the court of appeals' reasoning and holdings, argues that this Court should affirm the court of appeals' decision to reverse, and offers further argument in support, including, among other arguments, that the court of appeals could have applied even a less deferential harm analysis, that Texas has long upheld the admission of trauma evidence in the context of defensive issues, and that the reasonable firmness calculation is not a calculation made in a vacuum.

STANDARD OF REVIEW

The court of appeals held that the trial court abused its discretion when it excluded evidence of PTSD as it related to his defense of duress. Respondent agrees and argues further that the court of appeals may have applied too deferential of a

harm analysis. The exclusion of testimony about Respondent's particular circumstances effectively precluded him from presenting a complete duress defense. *See Crane v. Kentucky*, 476 U.S. 683, 690 (1986) ("[T]he Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense"') (quoting *California v. Trombetta*, 467 U.S. 479, 485 (1984)). Respondent argues that when a trial court's evidentiary ruling "precludes the presentation of a defense," a reviewing court should review the ruling de novo. *See U.S. v. Ross*, 206 F.3d 896, 898-99 (9th Cir. 2000). "Where an evidentiary error has occurred in a criminal prosecution, [the appellate court should review] de novo whether the error 'rises to the level of a constitutional violation."' *U.S. v. Haischer*, 780 F.3d 1277, 1281 (9th Cir. 2015) (quoting *U.S. v. Pineda-Doval*, 614 F.3d 1019, 1032 (9th Cir. 2010)). If it does, the reviewing court must reverse the conviction unless it concludes that the error was harmless beyond a reasonable doubt. *Id.; see* Tex. R. App. P. 44.2(a).

FACTS SURROUNDING OFFENSE RELEVANT TO DEFENSE OF DURESS

Although Respondent admitted that he engaged in the conduct necessary to raise a defense—buying cleaning supplies, retrieving Villanueva from the gas station, and holding complainant's feet, all at Armijo's direction—he also repeatedly indicated that he was terrified of Armijo. (SX 73, 76; RR6:225). Respondent

admitted to police in video-recorded interviews that he was present while Armijo tortured complainant. (SX 73, 76). He admitted to leaving the offense site twice, once to buy cleaning supplies and a second time to retrieve Villanueva from a nearby gas station, and both times at Armijos's direction. (SX 73, 76; RR6:224). Respondent indicated in his July 6th interview that he also held down complainant's legs, at Armijo's direction, while Armijo duct-taped his hands. (SX 76; RR7:103). He stated, no fewer than six times, that he feared Armijo and even cried when police showed him Armijo's picture in a lineup. (SX 73, 76).

Respondent ultimately spoke with a 911 call operator because he was afraid. (SX 76). Armijo had made specific threats to kill Respondent, his family, and complainant's family while ordering Respondent to complete tasks during the offense. (RR7:50, 110). The threats to Respondent and his family were imminent; Armijo knew where Respondent's family lived, and their home was only two blocks away. (RR7:26). Armijo demonstrated his facility and ability to carry out his threat when he escaped the offense location and ran at least one block away while officers were surrounding him. (RR6:75). When Respondent did leave Elwayne for the final time, he first retrieved his mother from her home in the same the neighborhood as

the site of the offense and removed her to a location outside of the neighborhood (his brother's home) before calling 911. (SX 73, RR7:51).

Further, Armijo had an arsenal of weapons available to him inside the offense location and was actively using them on complainant and Villanueva, including two semi-automatic handguns, at least one of which contained live fire; a baseball bat; boards; two knives; and an AR-15 assault rifle. (SX 73, 76; RR6:69, 128, 138-39). He had threatened Respondent with both a handgun and an AR-15 semi-automatic rifle by pointing the weapons directly at him. (SX 73, 76).

Other evidence substantiated the defense's theory of duress, particularly his objectively reasonable perception of Armijo's violent reputation—namely that Villanueva also feared Armijo. When police discovered Villanueva, she was "extremely" worried about her own safety and getting away from Armijo. (RR6:33). She testified that Armijo was wielding a bat along with two handguns, an assault rifle, a folding knife, and sticks. (RR6:109-115, 128). The pistols recovered from the scene were semi-automatic or automatic – at least one contained live fire – and were capable of firing multiple bullets, and the assault rifle was a high-powered, multiple-shot assault rifle. (RR6:131). Villanueva testified repeatedly about Armijo's reputation for violence both while he was torturing complainant and before, a

reputation that Armijo encouraged. (RR7:27). She testified that despite having broken up with Armijo, she texted him on the day of the offense because she was afraid to run into him without having done so. (RR6:150). She testified that if she saw him in the neighborhood without having contacted him, he would beat her. (RR6:150). She was persistently scared of what he might think or "do." (RR6:152). A police crime-scene analyst identified cable near the converted garage that could be evidence of video surveillance; Villanueva confirmed that there were video surveillance cameras on the property. (RR6:127, 244). She testified that Respondent also looked "scared" and appeared "nervous" on the car ride from the gas station. (RR6:170-71; 225-27).

ADMISSIBILITY OF PTSD EVIDENCE AS IT RELATES TO AN AFFIRMATIVE OR JUSTIFICATION DEFENSE

Texas courts have long upheld the guilt-innocence phase admissibility of trauma evidence as it relates to justification and affirmative defenses. *See Fielder v. State,* 756 S.W.2d 309 (Tex. Crim. App. 1988) (holding that because battered wife who killed her husband raised the issue of self-defense, the trial court erred in excluding expert testimony on battered woman's syndrome); *Ex parte Perusquia*, 336 S.W.3d 270, 272-73 (Tex. App.—San Antonio 2010, pet. ref'd) (noting that jury heard clinical psychologist's testimony about battered woman's syndrome and post-

traumatic stress disorder in relation to self-defense); *Richards v. State*, 932 S.W.2d 213, 214-15 (Tex. App.—El Paso 1996, pet. ref'd) (noting that court approved funding for expert to assist defendant with his PTSD-based insanity defense); *Edwards v. State*, 280 S.W.3d 441, 443 (Tex. App.—Ft. Worth 2009, pet. ref'd) (noting that defense expert testified to previous diagnoses of insanity informed by diagnosis of PTSD); *Mendiola v. State*, No. 08-16-00304-CR, 2019 WL 3283313 (Tex. App.—El Paso, July 22, 2019, pet. ref'd) (not designated for publication) (noting that defense expert testified to insanity defense informed by PTSD diagnosis).

To the extent that courts have allowed trauma evidence for justification defenses and not all affirmative defenses, Respondent argues that there are striking similarities between the justification defense of self-defense and the affirmative defense of duress. *See State v. B.H.*, 834 A.2d 1063, 1072 (N. J. App. Div. 2003), *aff'd as modified and remanded*, 870 A.2d 273 (2005). These similarities dictate the courts' logical progression from admitting, for instance, evidence of battered woman syndrome in self-defense cases to admitting such evidence to support a defense of duress. *Id*. (citing Kelly Grace Monacella, *Supporting a Defense of Duress: The Admissibility of Battered Woman Syndrome,* 70 *Temp. L.*

Rev. 699 (1997)). Other legal commentators, describing battered woman's syndrome as a form of post-traumatic stress disorder, conclude that "[b]ecause duress and self-defense both require proof of similar elements, it is illogical to permit PTSD testimony in one but not the other." *Id*. (citing Edgar Garcia-Rill & Erica Beecher-Monas, *Gatekeeping Stress: The Science and Admissibility of Post-traumatic Stress Disorder,* 24 *U. Ark. Little Rock L. Rev.* 9, 34-35 (2001)).

Texas Penal Code section 8.05(a) ("Duress") characterizes duress as an affirmative defense, requiring proof by a preponderance of the evidence, based on compulsion:

> (a) It is an affirmative defense to prosecution that the actor engaged in the proscribed conduct because he was compelled to do so by threat of imminent death or bodily injury to himself or another. . . .

See also Tex. Penal Code § 2.04(d). Compulsion within the meaning of this section exists only if the force or threat of force would render a person of reasonable firmness incapable of resisting the pressure. Tex. Penal Code § 8.05(c). An imminent threat is a present threat of harm. *Anguish v. State*, 991 S.W.2d 883, 886 (Tex. App.—Houston [1st Dist.] 1999, pet. ref'd). It has two components: (1) the person making the threat must intend and be prepared to carry out the threat immediately, and (2) the threat must be predicated on the threatened person's failure to commit

the charged offense immediately. *See Devine v. State*, 786 S.W.2d 268, 270-71 (Tex. Crim. App. 1989); *Anguish*, 991 S.W.2d at 886.

"The affirmative defense of duress is, on its face, a confession-and-avoidance or 'justification' type of defense . . . . 'this justification, by definition, does not negate any element of the offense, including culpable intent; it only excuses what would otherwise constitute criminal conduct.'" *Rodriguez v. State*, 368 S.W.3d 821, 824-25 (Tex. App.—Houston [14th Dist.] 2012, no pet.) (citation omitted); *see also Gomez v. State*, 380 S.W.3d 830, 834 (Tex. App.—Houston (14th Dist.) 2012, pet. ref'd).[3] Justification defenses use objective standards that depend on the beliefs of a reasonable person in the defendant's circumstances rather than the defendant's subjective beliefs: as an example, "Arizona courts have long held that a murder defendant who defends on the basis of justification should be permitted to introduce evidence of specific acts of violence by the deceased if the defendant either observed the acts himself or was informed of the acts before the homicide." *State v. Taylor*, 817 P.2d 488, 491 (Ariz. 1991). This evidence demonstrates the defendant's

[3]The State appears to agree that duress is akin to a justification defense by its citation to *Henley v. State*, 493 S.W.3d 77 (Tex. Crim. App. 2016).

knowledge of the victim's violent tendencies and shows that the defendant was "justifiably apprehensive" of the victim. *Id*.

This same logic applies to establishing a defense of duress. Knowledge of the circumstances under which the defendant committed the alleged crimes is essential to the jury's determination of whether the defendant's actions were reasonable. *See U.S. v. Nwoye*, 824 F.3d 1129, 1137 (D.C. Cir. 2016). "Reasonableness . . . is not assessed in the abstract. Rather, any assessment of the reasonableness of a defendant's actions must take into account the defendant's 'particular circumstances,'" which include "facts known to the defendant at the time in question, such as the defendant's knowledge of an assailant's violent reputation." *Id*.; *U.S. v. Dixon*, 901 F.3d 1170, 1180–81 (10th Cir. 2018) (noting that plain text of federal duress instruction makes clear that the legal propriety of a defendant's assessment of, and response to, the circumstances that allegedly have subjected her to duress is determined by applying an objective lens—that is, a defendant's subjective beliefs or perspectives are only relevant insofar as they are objectively reasonable). In *U.S. v. Marenghi*, the court indicated that because the distinction between subjective and objective evidence is often unclear, courts should be wary to erect per se bars against trauma evidence in the context of duress:

> This can be demonstrated by changing the "snapshot" of circumstances that is shown to a jury in any particular case. If the jury sees the defendant's circumstances immediately prior to commission of the crime and there is no gun held to her head or other markedly extreme duress, the jury may conclude that any fear of imminent death or violence was unreasonable. [Footnote omitted]. However, if the defendant is permitted to pull the camera back to provide the broader picture, so to speak, of her circumstances, the jury could learn of a pattern of violence, control, and coercion leading up to the criminal act. [Footnotes omitted]. Expert testimony could be helpful to explain to the jury how a reasonable person reacts to repeated beatings and emotional abuse. Providing the jury with information of specific incidents of abuse while providing no information about how such treatment can, over time, establish a dynamic where the threat of abuse hovers over every interaction between the individuals, even if such threat is not always articulated, would give the jury only half of the story. In effect, this expert testimony may be characterized as explaining how a reasonable person can nonetheless be trapped and controlled by another at all times even if there is no overt threat of violence at any given moment.

U.S. v. Marenghi, 893 F.Supp. 85, 94–95 (D. Me. 1995). The reasonableness calculation should not be limited to the defendant's knowledge of immediate circumstances or an aggressor's violent reputation.

Considering the subject's particular circumstances will not transform the reasonableness calculation from an objective inquiry into a subjective inquiry. In the context of PTSD-subset battered woman's syndrome, courts have held the introduction of evidence of past incidents of abuse, while relevant, does not transform the duress defense into a subjective inquiry of whether a specific

defendant was unusually susceptible to succumbing to otherwise implausible threats. *State v. Richter*, 424 P.3d 402, 408 (Ariz. 2018). The proper inquiry for a jury considering PTSD is whether a reasonable person subjected to the same threats and pattern of abuse would have believed he or she was compelled to engage in the same illegal conduct. *Id*. This is also the proper inquiry here.

The defendant must have acted under the influence of a *reasonable* fear of imminent death or serious bodily harm at the time of the alleged crime. *See* 2 Wayne R. LaFave, Substantive Criminal Law § 9.7(b) (2d ed. 2003) ("the danger need not be real; it is enough if the defendant reasonably believes it to be real"); *see also U.S. v. Jenrette*, 744 F.2d 817, 820–21 (D.C. Cir. 1984). "In determining if the fear was 'well-grounded,' the [duress] defense does permit the fact-finder to take into account the objective situation in which the defendant was allegedly subjected to duress. Fear which would be irrational in one set of circumstances may be well-grounded if the experience of the defendant with those applying the threat is such that the defendant can reasonably anticipate being harmed on failure to comply." *U.S. v. Johnson*, 956 F.2d 894, 898 (9th Cir. 1992), *op. supplemented on denial of reh'g sub nom.* Any assessment of the reasonableness of a defendant's actions must take into account the defendant's "particular circumstances," at least to a certain extent. *Id*. (citation

omitted); *see also* Model Penal Code § 2.09 (duress defense appropriate whenever a "person of reasonable firmness *in his situation* would have been unable to resist" threat of unlawful force) (emphasis added).

Thus, whether expert testimony on any syndrome is relevant to the duress defense turns on whether such testimony can identify any aspects of the defendant's "particular circumstances" that can help the jury assess the reasonableness of his actions. Examination of the particulars of the duress defense shows that expert testimony on battered woman syndrome, for instance, can indeed identify relevant aspects of a battered woman's particular circumstances, like hypervigilance to cues of impending danger. *Nwoye*, 824 F.3d at 1137. Testimony on PTSD can likewise illuminate relevant aspects of the circumstances of a person suffering from PTSD, including how a victim of a prior attack resembling the scenario a violent offender is threatening would believe the threat. *Moreno*, 586 S.W.3d at 496 (holding that testimony regarding violent home invasion and expert testimony regarding diagnosis of PTSD "could indeed have identified relevant and probative aspects of [Respondent's] particular circumstances"). *Nwoye* illustrates that any diagnosed mental health condition may be relevant to a duress or justification defense. *Nwoye*, 824 F.3d at 1137-38; *see also U.S. v. Wilks*, 572 F.3d 1229, 1233-34 (11th Cir. 2009)

(discussing trial testimony including, "One of [defendant]'s experts testified that [the defendant] suffered from AIDS dementia at the time and that [his] ability to assess a stressful situation was impaired"); *U.S. v. Escobar*, 68 F. App'x 836, 837 (9th Cir. 2003) (affirming grant of new trial: "The newly discovered evidence was clearly material to Escobar's defense of duress. In light of the facts of the case, the evidence of his low IQ provided strong corroboration for his claim"). Further, mental health disorders are not matters within the understanding of the average layperson and require expert testimony. *See, e.g., Hall v. Florida*, 134 S. Ct. 1986, 1993, 2000-01 (2014) (illustrating Supreme Court justices' reliance upon medical experts to inform their decision on what it means to be intellectually disabled).

Respondent argues that a person of objectively reasonable firmness is not a person in a vacuum; it necessarily includes a person's particular circumstances. It is a person of reasonable firmness in the person's circumstances. The State is relying on a 25-year-old case to argue that trauma evidence would explain only why this "particular defendant succumbed when a reasonable person without a background of being battered might not have." *Willis*, 38 F.3d at 175. This explanation belies the evolution of the legal community's understanding of mental health and any reasonable person standard. *See, e.g., Moore v. Texas*, 137 S. Ct. 1039, 1053 (2017)

("Reflecting improved understanding over time, *see* DSM–5, at 7; AAIDD–11, at xiv-xv, current manuals offer 'the best available description of how mental disorders are expressed and can be recognized by trained clinicians,' DSM–5, at xli") (citations omitted).

In this case, Respondent was objectively suffering from PTSD. This diagnosis specifically informed his actions during the course of the offense. The proffered evidence of PTSD, emanating from Respondent's witnessing the home-invasion/murder of his father, linked specifically to threats that Armijo made to kill Respondent and his family and to his knowledge of Armijo's violent reputation. It was therefore relevant to whether a person of reasonable firmness believed Armijo would execute his threats and probative to the jury's evaluation of whether Respondent acted under duress during the course of the offense. *See* Tex. R. Evid. 401, 403; *see State v. Jacobson*, 418 P.3d 960, 964 (Ariz. Ct. App. 2017) (requiring that PTSD diagnosis be both relevant and probative of defense). Respondent's decision to comply with Armijo's directives was a decision based on reasonable firmness (because that standard cannot exist in a vacuum) and on reasonable firmness for a person in his circumstances.

Reasonableness is the touchstone of a duress defense. *Nwoye*, 824 F.3d at 1136. It is clear from the record that both Respondent and Villanueva complied with Armijo's orders because his force or threat of force would render a person of reasonable firmness incapable of resisting the pressure. It rendered a person of reasonable firmness suffering from PTSD incapable of resisting the pressure. The evidence substantiated their fears. *Cf. Sanchez v. State*, No. 13-14-00060-CR, 2016 WL 362919, at *1–3 (Tex. App.—Corpus Christi-Edinburg Jan. 22, 2016, pet. ref'd) (not designated for publication) (affirming jury's rejection of duress because defense rested on credibility of Sanchez's claim that he made decisions at knife-point in the face of evidence that (a) there was no knife recovered, (b) there was no notation in the police report of this excuse at arrest, and (c) police did not observe a knife at the scene). A diagnosis is not a subjective determination; in this case, Respondent's objective diagnosis by a licensed expert was an objective determination that informed his defense of duress. The trial court erred in excluding it from the jury's consideration. *See* Laurie Kratky Dore, *Downward Adjustment and the Slippery Slope: The Use of Duress in Defense of Battered Offenders*, 56 Ohio St. L.J. 665, 723 (1995) ("The reasonableness of a battered offender's conduct is a matter for the

jury to assess in light of all the facts and circumstances, rather than a question of law for the court). This Court should affirm the court of appeals' decision.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Respondent prays that this Court affirm the court of appeals' decision under any harm standard and for any such other relief to which he may be justly entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of February, 2020, a true copy of the foregoing petition was served by electronic delivery to the Dallas County Criminal District Attorney's Office at DCDAAppeals@dallascounty.org and Stacey M. Soule, State Prosecuting Attorney, at Stacey.Soule@spa.texas.gov.

Christi Dean

CERTIFICATE OF COMPLIANCE

I hereby certify that the relevant word count in this document, which is prepared in Microsoft Word 2010, is 6,173.

Christi Dean